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IN THE

Supreme Court of the United States

October Term, 1954

No. 202

PARMA WATER LIFTER COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

The Parma Water Lifter Company, a corporation, Petitioner herein prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on the 8th day of March, 1954.

OPINIONS BELOW

The Order of the National Labor Relations Board (R57) is reported in 102 NLRB 193 (No. 37) and the Opinion of the Court of Appeals (R191) is reported in 211 F. 2d 258.

JURISDICTION

The Judgment of the Court of Appeals was dated on March 8, 1954 (R191) and Petition for Rehearing was filed on April 5, 1954, and denied on April 13, 1954. (R207) The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED

I.

Whether an employer is required to bargain with a union when the authority of the union to represent the employees has been revoked by a majority of the employees prior to the commission of any unfair labor practice by the employer.

II.

Where an employee is left in complete charge of a department with implied authority to hire and fire during the absence of the regular foreman and manager, is the employee exempt from the provisions of the Act as a supervisor?

III.

Should the reviewing court set aside administrative action unsupported by substantial evidence considering the record as a whole?

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act as amended (61 Stat. 136, 29 U. S. C., Supp. V, Secs. 151, et seq.) are set forth in the appendix at pages 14, 15 and 16.

STATEMENT OF THE CASE

POINT No. 1

On the evening of February 4, 1952, a majority of the Petitioner's employees signified their intention of joining the union at a meeting at the home of one of the employees, Wayne Morris. On the morning of February 5, the same employees that attended the meeting on February 4 circulated a Petition as follows:

> "We, the undersigned, wish to be released from all association with the I. M. A. Union, Feb. 5, 1952."

This Petition was signed by 11 of Petitioner's 17 employees and the original Petition was mailed to the company's attorney on February 5, 1952, by one of the employees signing the Petition. On or about February 6, the company received a letter from the union requesting bargaining rights. (R78) On February 9 the Petitioner addressed a letter to the union suggesting that the union did not represent a majority of the employees in the following language:

"In response to your letter dated February 5, 1952, I believe there must be some mistake as I do not believe you represent a majority of our employes eligible for your Union.

"I have been advised by our Attorney, E. A. Weston of Boise, that he received a registered letter on February 6 enclosing the following statement:

> "We, the undersigned wish to be released from all association with the I. M. A. Union."

and the same was signed by the following employees: Harry E. Willson, Alfred G. VanDevanter Alva Riggs, Dawson P. Cox, Glen W. Upchurch, William E. Cox, John T. Cumbry, Edwin E. Newkirk, Sam W. Pollard, Earl Young, Geo. Farden.

"Since this represents more than a majority of our employees I presume you are mistaken as to being the bargaining representative. However, if you wish to have an election to determine the question, that will be agreeable with us."

The union made no reply to this letter.

The Board, after the usual proceedings issued a Decision and Order in which it found that the Petitioner had engaged in interference, restraint and coercion of its employees in violation of Section 8 (a) (1) of the Act and had refused to bargain collectively with the union as the exclusive representative of the Petitioner's employees in violation of Section 8 (a) (5)

of the Act. The Court of Appeals granted a Decree of Enforcement of the Board's Order. (R191)

POINT NO. 2

The uncontradicted testimony of the employee Wayne Morris shows that this employee was the head of the lathe room and that he was informed that he was a sort of a foreman in February of 1953, (R115) and that he on occasion suggested what other employees in his department would do to expedite work and assigned work to other employees under him (R116) and on cross examination made the following statement:

> "Q. But in the absence of Mr. Rose (foreman) you are in charge of that department?
>
> "A. Yes, that is my understanding." (R132)
>
> "Q. But if Mr. Rose left then you would be in charge of that department, is that right?
>
> "A. That is correct."

The Petitioner contends that under this statement of facts, the employee Wayne Morris meets the test required by Section 2 (11) of the Act and should be qualified as a supervisor.

POINT NO. 3

The record shows no substantial evidence to support a finding that the Petitioner had in any way interfered with the employees in their right to organize

and fails to show any substantial evidence that the Petition circulated by the employees renouncing membership in the union was in any way influenced or urged by the Petitioner, the findings by the reviewing court being therefore contrary to the provisions of Section 10 (e) of the Act, said section requiring that the findings of the Board shall be conclusive only "if supported by substantial evidence on the record considered as a whole" also contrary to the provisions of Section 10 (e) of the Act which requires that there must be "a preponderance of the testimony" to justify a finding of commission of an unfair labor practice. The reviewing court in this case did not accept this responsibility to see if there was substantial evidence to support the finding by the Trial Examiner.

SPECIFICATIONS OF ERRORS TO BE URGED

The Appeals Court erred

1.

In failing to hold that at any time, and particularly prior to certification employees may revoke the authority of a labor organization to represent them as their bargaining representative.

2.

In ruling that the employer was guilty of coercion and interference with the employees freedom of choice where there is no evidence of interference at the time the employees voluntarily revoked the authority of the union.

3.

In ruling that the employee Wayne Morris was not a supervisor as defined by the Act when the uncontradicted testimony shows that the employee was left "in charge" of his department in the absence of the manager or foreman.

4.

In ruling that there was substantial evidence to support the finding of the Board where an examination of the record as a whole would not show substantial evidence.

5.

In enforcing the Board's Order.

REASONS FOR GRANTING THE WRIT.

THE DECISIONS OF THE COURT BELOW IN THE INSTANT CASE IS DIRECTLY IN CONFLICT WITH THE DECISIONS OF THE COURT OF APPEALS FOR THE SECOND, THIRD, FIFTH AND SIXTH CIRCUITS.

The Court of Appeals for the Second Circuit has refused to enforce that portion of an Order of the Board similar to the instant case which was in disregard of the rights of the employees guaranteed under Section 7 of the Act as amended (*NLRB vs. Gaynor News Co.*, 197 F. 3d 719). In that case the Board Order directed the employer to cease and desist

from collective bargaining with any union until the union was duly certified. The Court in that case stated: "We do not however, think that the possible danger to employees of allowing some collective bargaining relations with this union outweighs the substantial harm to them in taking away for an indefinite period all collective bargaining rights." (197 F. 2d 724)

The Court of Appeals for the Third Circuit has similarly ruled that Section 7 limits the Board in ordering affirmative action to effectuate the policy of the Act. (*NLRB vs. Globe Automatic Sprinkler Co.*, 199 F. 2d 64). In that case the Board found that the employer had unlawfully refused to bargain with the certified union which union had been repudiated during the year following certification. The Court stated: "The conclusion is inescapable that the Board overlooked the salient consideration that the National Labor Relations Act was designed by the Congress to serve as a shield and not as a shackle to the millions of our employed whose welfare is the proper subject of national concern." (199 F. 2d 70)

The Court of Appeals for the Fifth Circuit has similarly required the Board to recognize the rights of employees under amended Section 7 in ordering affirmative action to effectuate the policies of the Act. *NLRB vs. Parker Bros. Co.*, 209 F. 2d 278. The Board in this case ordered the employer to cease recognizing an independent union until it was certified by

the Board. The Court inserted a provision in the contract as follows: "Nothing in this Decree shall authorize the Board to arbitrarily refuse to certify the Independent as representative of the employees or prevent the employees from fully exercising their rights guaranteed to them by the Act to choose as their own representative the Independent or any other or none if that is their wish, or prevent the employer from recognizing the Independent if it is freely chosen by its employees and the Board unreasonably refuses it an opportunity by an election or otherwise to obtain certification."

The Court of Appeals for the Sixth Circuit, in the cases of *NLRB vs. Vulcan Forging Co.*, 188 F. 2d 927, and *Mid-Continent Petroleum Corporation vs. NLRB*, 204 F. 2d 613, recognizes the rights of employees to select their bargaining representative and to revoke that selection even after certification. The conflict on the question was recognized in the Vulcan Forging case and in the Mid-Continent Petroleum case, the Sixth Circuit, after reviewing the decisions of the various circuits on the question stated: "From the foregoing adjudications, there manifestly appears considerable conflict in the circuits on the issue here before us."

The question presented here is of fundamental importance to the administration of the Labor-Management Relations Act of 1947. Nearly all of the cases that we can find go into the question of whether or not

the employees may repudiate their union after certification. This case touches on the question of whether the employees may repudiate their union before certification and before the employer has been or could have been guilty of any unfair labor practice and until this conflict of the decisions has been decided, the rights of the employees and the employer cannot be determined.

The actual effect of this conflict of decisions is to create a state of confusion and indecision among the employees as to their rights under the law and as to the employers concerning their obligations to bargain or not to bargain with a union as the representative of their employees. For example, in the present case, the employees renounced membership in the union within 12 to 15 hours after they had signified a desire to join and notified the employer of this fact in writing and this naturally placed the employer in doubt as to his obligation under the law and confused the employees as to their rights to renounce or repudiate the union and since that time the relationship between the employer and his employees has been unsable and undetermined. For that reason it is vital that the question involved in this case be decided finally by the Supreme Court.

In the NLRB vs. Vulcan Forging Co. case (Supra) the Court stated: "It would clearly be contrary to the express purpose of the Act to require the employees in this case to bargain through a representa-

tive that practically all of them had repudiated. They are entitled by law to bargain collectively through a representative of their own choosing. To force them to bargain through a representative which they had repudiated would be depriving them of their right to bargain through a representative of their own choosing."

The question of repudiation by a group of employees within 12 or 15 hours and before certification is a new and novel question and one that should be determined by the Supreme Court.

THE STATUS OF EMPLOYEE MORRIS AS A SUPERVISOR

Section 2 (11) of the Act is a very broad and all-inclusive definition of the term "supervisor". The definition applies to any employee who may hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline or who has responsibility to direct or adjust grievances or recommend action in this connection, and if the employee may do any of the acts defined in this section, the section being unambiguous, the employee should be considered a supervisor.

The uncontradicted testimony in this case shows that the employee Wayne C. Morris was left in charge of the department in the absence of Foreman Rose or Manager Nelson. The testimony also shows that this employee assigned the work in his department.

Petitioner believes the decision in this case is in conflict with the Sixth Circuit Court case of *Ohio Power Company vs. NLRB*, 176 F. 2d 385, where the Court held that possession of power and responsibility to direct employees is sufficient to render an individual as supervisor even though he possess none of the other specific powers enumerated in the Act. A similar ruling was given in the case of *NLRB vs. G. Budd Manufacturing Co.*, 169 F. 2d 571, and that the holding of any of the powers was in the disjunctive and that the possession of any one of the authorities listed in the section places the employee in a supervisory class. This position of the Court follows the decision in *Wright vs. Vinton Branch Bank*, 300 U.S. 440, 57 S. Ct. 556, 81 L. Ed. 736, where the Court stated that where the wording of the Act is plain and unambiguous there is neither necessity or justification for resort or legislative history to interpret its meaning.

FAILURE OF THE COURT OF APPEALS TO RULE THAT THE ADMINISTRATIVE ACTION WAS UNSUPPORTED BY SUBSTANTIAL EVIDENCE CONSIDERING THE RECORD AS A WHOLE.

The evidence in the instant case taken as a whole does not substantiate a ruling that the employer was guilty of any unfair labor practice at or prior to the time the employees voluntarily disassociated themselves from the union. Nor is there any substantial

evidence in the case to support a ruling that the employee Wayne C. Morris was not a supervisor.

The decision in the present case is in conflict with the decisions in the Second Circuit, in the case of *Universal Camera Corporation vs. NLRB*, 340 U.S. 474, 95 L. Ed. 456, also from the Second Circuit in the case of *Consolidated Edison Company vs. NLRB*, 305, U.S. 197, the Court held that the findings must be supported by substantial evidence as required by Section 10 (e) of the Act as amended.

In the case of *Falls City Creamery Company*, 207 F. 2d 820, the Sixth Circuit Court ruled that the Court cannot consider an inference as a substantial fact. This case indicates that the burden of proving unfair labor practices rests with the Board.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be issued upon the grounds and for the reasons stated in this Petition.

Respectfully submitted,
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Dated: June, 1954.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. 151 et seq.), are as follows:

Supervisor

Sec. 2 (11). The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * *

Prevention of Unfair Labor Practices

Section 10. * * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees

with or without back pay, as will effectuate the policies of this subchapter. * * * *

(e) * * * * The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinbefore provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 202

PARMA WATER LIFTER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 191-201) is reported at 211 F. 2d 258. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 57-60) are reported at 102 NLRB 198.

JURISDICTION

The judgment of the court below was entered on March 8, 1954, and a petition for rehearing

was denied on April 13, 1954 (R. 207). The petition for a writ of certiorari was filed on July 9, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and under Section 10(e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et. seq.*), in addition to those set forth in the Appendix to the petition, are as follows:

> Sec. 10 (e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a

decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that employee Morris was not a supervisor within the meaning of Section 2(11) of the Act.

2. Whether substantial evidence supports the Board's finding that any loss in the majority status of the bargaining representative chosen by petitioner's employees was attributable to petitioner's unfair labor practices and hence did not excuse petitioner's refusal to bargain collectively.

STATEMENT

A. The facts as found by the Board

1. *The organization of the Union*

As the result of a two-day organizing drive led by employees Wayne Morris and Richard Stutheit, on February 2 and 3, 1952, 15 of petitioner's 19 production and maintenance employees designated the Union[1] as their bargaining representative (R. 21-22; 103, 118). The following morning, Febru-

[1] International Association of Machinists, Local Lodge No. 1491, AFL.

ary 4, Morris and several other employees wore Union buttons to work (R. 22; 121-124, 140). Petitioner's production manager, Lee Rose, noticed the buttons and asked Morris whether the employees were "organizing the shop" (R. 22; 124-125). Morris replied that they were attempting to do so and told him of a scheduled meeting at Morris' home that evening for the purpose of taking further action in that direction (*ibid.*). At Morris' request, Rose agreed not to inform petitioner's president, Lloyd Nelson, of these activities until after the meeting had been held (*ibid.*).

That evening the scheduled meeting was held at Morris' home. It was attended by Manager Rose, Foreman Joe Gilmore, and 15 employees (R. 22; 99-100, 122-123, 174). The meeting was addressed by Union Business Representative Walker and, after some discussion, a secret ballot was taken on whether the employees wanted the Union to represent them (R. 22-23; 101-102, 122-123). The vote was 14 to 1 in favor of the Union (*ibid.*). At the conclusion of the meeting, Walker announced that he would send a registered letter to petitioner's president, requesting collective bargaining negotiations (R. 103-104, 123).

2. *Petitioner's refusal to bargain and its efforts to undermine the Union's majority support*

On the morning of February 5, Manager Rose asked Morris if he thought the employees would be satisfied if petitioner raised the pay of all

welders and machinists to $1.25 and $1.35 an hour, respectively, and then granted a 10 percent increase on that basis (R. 23, 29-30; 125). When Morris said "that is about what we are trying to work for," Rose declared that President Nelson was "willing to do that if you drop this union thing" and warned Morris that "Nelson says that before he will sign the union contract he will sell the shop and go out of business" (*ibid.*). Rose added that President Nelson had a chance to sell the plant and had already obtained permission from petitioner's stockholders to do so (R. 23, 125-126).

That same morning Manager Rose told Employee Young to take off the Union button he was wearing and said that if he "was for the Union to go to a union shop and leave the men alone that wanted out of the Union, that didn't want the union shop" (R. 24-25; 141). A few hours later, Rose again told Young to "throw that [Union] button away" (R. 24-25; 143). At about the same time Young was told by Foreman Gilmore that Gilmore had been in the office talking with President Nelson and "trying to keep him from getting mad," that Nelson "threatened to sell the shop and hire a lawyer to fix this thing," but that Gilmore thought he had him "cooled down" (R. 25; 145).

During the day, Manager Rose told Morris to get two other employees, one who favored the Union and one "not so much for the Union," to meet with President Nelson, "and see if we couldn't thrash this thing out" (R. 23; 126). Morris requested permission to notify the Union's business

representative, Walker, of the proposed meeting and then telephoned Walker at his office (*ibid.*). Walker called Nelson and told him that the Union had sent petitioner a registered letter requesting recognition as bargaining representative of the Company's employees, and that since the proposed meeting involved matters "affecting union representation" he, as the Union's agent, should be present (R. 24; 104-105). Walker then suggested that the meeting be postponed, and Nelson agreed (R. 24; 105).

A "withdrawal petition," by means of which certain employees undertook to repudiate their designation of the Union, was circulated in the plant on this same day, February 5. Sometime during the afternoon Manager Rose saw employees Curtis and Riggs talking about a "piece of paper" (R. 25; 171). He obtained the paper from the employees and found that it was a list of four or five signatures with no heading or description (R. 25; 171-172). When he asked Riggs the purpose of the paper, Riggs said it was a "petition and we are sick and tired of this union deal, and we want to get out of it" (R. 25; 172). Rose thereupon returned the paper to Riggs (R. 25; 172).

A little later employee Cox told Manager Rose that some of the employees were objecting to signing the petition because it had no heading and "they don't know what they are signing" (R. 25; 172, 173). When Rose asked Cox what sort of heading he wanted, Cox replied, "Well, generally, they just want to get out of the union" (R. 25;

172). Rose thereupon dictated to Cox, "We the undersigned wish to be released from all association with the IAM Union" (R. 25-26; 171, 172, 173). Cox wrote the heading on the petition (R. 26; 172, 173).

Cox testified that he himself had signed the petition because he had heard rumors that the plant would close if the Union succeeded in organizing the employees, and after "we heard Mr. Nelson was going to raise our wages, we figured we could get a raise and not have the Union and we were satisfied with the raise" (R. 26; 176-177).[2] During the day, as the petition was circulated, Manager Rose told employee Lyall "if [your] job means anything to [you] go through and sign" the petition (R. 26; 139). Employee Pollard, in Manager Rose's presence, told employee Young that he had "better sign" the petition (R. 26; 141-142). Young said that he would sign, if only "to get you guys off my neck" (R. 26; 142).

On February 8, petitioner posted a notice reducing the work week from 44 to 40 hours (R. 26, 70-71). The change was made without any

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[2] On the morning of February 5, Morris was approached by employee Van Devanter, who asked if another union meeting could be called (R. 128). Morris said it was possible and asked the purpose of such a meeting (*ibid.*). Van Devanter replied that he wanted to "see if we can get out of this union thing," because "if we don't Nelson is going to sell the business. Jim Watson has got a check in the bank now for $50,000 for this building" (*ibid.*). Van Devanter, who had signed a Union authorization card, later signed the withdrawal petition (R. 160, 171).

prior consultation with, or notice to, the Union (R. 26-27; 79, 108-109).

On February 9, President Nelson wrote to Union Representative Walker in response to Walker's February 5 request for a bargaining meeting (R. 27; 80-81). In his letter Nelson, for the first time, challenged the Union's majority, informing Walker that his attorney had received a registered letter on February 6, containing the withdrawal petition signed by 11 employees (*ibid.*).

A week later, on February 16, President Nelson, again without consulting or notifying the Union, called a meeting of the employees and announced a wage increase varying from 10 to 26 cents per hour, retroactive to February 4, although immediately prior to the Union's organizing drive petitioner had refused increases to two employees who had asked for higher wages (R. 27, 31; 79-80, 82, 108, 154-155).

3. *The status of Morris as an "employee" rather than a "supervisor"*

Morris, one of the principal organizers for the Union, was hired by petitioner as a machinist, about four years prior to the events in this case (R. 114). He worked in the lathe shop with Doman, another machinist, and Stutheit, an apprentice (R. 19; 114, 116). The lathe shop was under the direct supervision of Manager Rose (R. 17; 114, 152). Although Rose designated Morris as being "in charge" of the lathe shop when Rose was absent from the plant (R. 17; 135), Morris did not direct

the other two employees in their work or otherwise supervise them (R. 17, 19; 116-118, 152). In fact, each of the three men would alternately ask one of the other two to perform certain work or to help on a particular job as circumstances demanded (R. 19; 116, 152-153, 157). Morris never acted, and was never authorized by petitioner to act, in connection with the hiring, discharging, promotion, or disciplining of employees, or the recommendation of such action (R. 18-19; 117, 133). He never participated in any meetings of supervisory personnel or attended any policy-making conferences at the plant (R. 17, 19; 135-136). Neither Morris himself nor his co-workers considered Morris to be a supervisor (R. 17; 118, 152).

On February 16, at the time President Nelson announced the general wage increase retroactive to February 4 (*supra*, p. 7), he announced also that Morris henceforth was "sort of a foreman" (R. 17; 115). This was the first time that any employee had been informed by petitioner that Morris was in any way to be considered a supervisory employee (R. 17; 117, 118, 153, 73). Despite this announcement, however, Morris' duties, responsibilities, and authority, as described above, remained unchanged (R. 17-18, 19; 116, 152). And, as before, Morris had no occasion to discipline either of the other employees who worked with him or to direct their work (R. 17-18, 19; 117, 118). Although Morris had received higher wages than the two other lathe shop employees, the pay differential

was in no way connected with supervisory status (R. 134).[3]

B. The Board's conclusions and order

Upon the foregoing facts, the Board found that Morris, the leader in organizing the Union, was not a "supervisor" within the meaning of the Act at any time here pertinent; that his activity on behalf of the Union did not, therefore, constitute employer interference with the employees' exercise of their rights under the Act; and that, on and after February 5, 1952, when the Union requested bargaining rights, it had an uncoerced majority of petitioner's production and maintenance employees (R. 14-19, 57-58). The Board, accordingly, found that petitioner had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union on and after that date (R. 29-32). It also found that petitioner had violated Section 8(a)(1) of the Act by unilaterally instituting the shorter work week on February 8, granting the unilateral wage increase on February 16, supporting the circulation of the withdrawal petition, threatening to close or sell the plant before it would sign a contract with the Union, promising benefits to the employees if they repudiated the Union, attempting to deal with the employees directly, and telling an employee to remove his Union button (R. 32-33).

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[3] Morris' wages were higher than Doman's because he had been hired pursuant to a statute which required an employer who hired a veteran to pay him at the rate the highest-paid journeyman was then receiving (R. 134, 116, 68-69).

The Board ordered petitioner to cease and desist from the unfair labor practices found, to bargain with the Union upon its request, and to post the usual notices (R. 58-60).

C. The decision of the court below

The court below (R. 191-201) affirmed the Board's findings that petitioner had, in violation of Section 8(a)(1) of the Act, interfered with, restrained and coerced its employees in the exercise of their rights under the Act and had refused to bargain collectively with the Union, in violation of Section 8(a)(5). Accordingly, it enforced the Board's order in full. More specifically, the court below sustained the Board's finding that Morris was an "employee" rather than a "supervisor," holding, in the language of the Act, that whatever limited authority he had was of a "routine or clerical nature" not requiring the "use of independent judgment" (R. 195). It concluded, therefore, that the Union's majority status was properly achieved and that the Union was entitled to recognition as the collective bargaining representative of the employees. The court also approved as supported by substantial evidence the Board's finding that petitioner had engaged in various acts of interference violative of Section 8(a)(1) and had thereby undermined the Union's majority status. It accordingly rejected as unfounded petitioner's claim that the withdrawal petition excused petitioner from bargaining with the Union. Relying upon the rule laid down by this Court in *Medo Photo Supply Corp.* v. *Na-*

tional Labor Relations Board, 321 U. S. 678, 687, the court below held that an employer cannot as a justification for its refusal to bargain "set up the defection of union members which it had induced by unfair labor practices" (R. 201).

ARGUMENT

1. Petitioner's contention (Pet. 5, 11-12) that Morris was a supervisor within the meaning of the Act, so that the Union's majority was in fact "coerced" by an employer representative and the Union was therefore not entitled to recognition, raises no question warranting review. Even assuming that petitioner could complain of conduct for which it was itself legally responsible (see R. 193), the evidence summarized above (p. 8) fully sustains the Board's finding, approved by the court below, that Morris lacked supervisory status as defined by the Act. The cases cited by petitioner (Pet. 12) do not conflict with the decision of the court below in this respect, but represent simply a determination that on the records presented in those cases the employees in question were supervisors. "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Pictures Co.* v. *Electric Co.,* 304 U.S. 175, 178; *National Labor Relations Board* v. *Pittsburgh Steamship Company,* 340 U.S. 498, 502-503.

2. Equally unsubstantial is petitioner's contention (Pet. 7-11), which blandly overlooks the findings affirmed by the court below, that there

is a question here (Pet. 10) "of whether the employees may repudiate their union before certification and before the employer has been or could have been guilty of any unfair labor practice * * *." As the petition necessarily acknowledges at a later point (pp. 12-13), the Board and the court below found that any loss in the Union's majority status was attributable to petitioner's unfair labor practices. This finding, solidly grounded in the evidence summarized above (pp. 3-8),[4] disposes of petitioner's argument. For it is settled that an employer may not "as justification for its refusal to bargain with the union, set up the defection of union members which it had induced by unfair labor practices, even though the result was that the union no longer had the support of a majority." *Medo Photo Supply Corp.* v. *National Labor Relations Board,* 321 U.S. 678, 687; *Franks Bros. Co.* v. *National Labor Relations Board,* 321 U.S. 702, 705.

There is, of course, no conflict with this established rule in any of the cases cited by petitioner (Pet. 7-9). In *National Labor Relations Board* v. *Globe Automatic Sprinkler Co.,* 199 F. 2d 64 (C.A. 3), *National Labor Relations Board* v. *Vulcan Forging Co.,* 188 F. 2d 927 (C.A. 6), *and Mid-Continent Petroleum Corp.* v. *National Labor Relations*

[4] Petitioner attacks the finding with a bald claim (Pet. 12-13) that it is not supported by substantial evidence. Even if the claim were less tellingly refuted by the evidence reviewed earlier, it would obviously not present a question warranting certiorari.

Board, 204 F. 2d 613 (C.A. 6), certiorari denied, 346 U.S. 856, the bargaining representatives' loss of majority status was in no way attributable to any employer unfair labor practices.[5] The other cases cited by petitioner, *National Labor Relations Board* v. *Gaynor News Co.,* 197 F. 2d 719 (C.A. 2), affirmed on another point *sub nom. Radio Officers' Union* v. *National Labor Relations Board,* 347 U.S. 17, and *National Labor Relations Board* v. *Parker Bros. & Co.,* 209 F. 2d 278 (C.A. 5), are wholly inapposite; they deal with the power of the Board to issue remedial orders in situations entirely different from that presented in the instant case.

[5] The instant case is similarly to be distinguished from *Ray Brooks* v. *National Labor Relations Board,* certiorari granted, 347 U.S. 916, where the issue is whether an employer is required to bargain with the certified representative of his employees for a reasonable period of time after certification, notwithstanding an alleged intervening loss of majority status by the representative not attributable to any unfair labor practices on the part of the employer.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any question of general importance warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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